THE DOMINOS OF GOLDWASSER: ONLY CONGRESS CAN STOP THE TOPPLING EFFECT BEFORE THE GAME IS OVER

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I. INTRODUCTION

February 8, 1996 was a much-heralded day in the telecommunications industry. After many years of behind-the-scenes negotiations, open floor debates and legislative sessions, the Telecommunications Act of 1996 ("Telecom Act") was at last signed into law. The goal of this legislation was to eliminate the last vestiges of monopoly in the United States telecommunications sector by introducing competition into the local phone market controlled by the former Bell System, now the Regional Bell Operating Companies ("RBOCs"), for over 100 years. The Telecom Act established a "pro-competitive, deregulatory national policy framework for telecommunications, opening all telecommunications markets to competition so as to make advanced telecommunications and information technologies and services available to all Americans." To accomplish these goals, Congress ordered the Federal Communications Commission (the "Commission" or "FCC") to implement various pro-competitive requirements on all incumbent local exchange carriers ("ILECs"), with more stringent pro-competitive market-opening obligations upon the RBOCs that dominated the local market and controlled bottle-

2 See DAVID WOLCOTT, An ALTS Analysis: Local Competition Policy and the New Economy, Assoc. for Local Telecomms. Services (Feb. 2, 2001) [hereinafter WOLCOTT].
4 In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, 114 FCC Rcd. 4761, para. 13 (1999); see also H.R. Conf. Rep. No. 104-458, at 1 (1996), reprinted in 1996 U.S.C.C.A.N. 10 (the purpose of the Telecom Act was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans and by opening all telecommunications markets to competition . . . ").
5 See generally NEWTON's, supra note 3. The Federal Communications Commission is an independent United States government agency, directly responsible to Congress. The Commission was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. On March 25, 2002, the Commission instituted a reorganized structure "as part of its reform efforts to make the FCC more effective, efficient and responsive," http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2002/nrmc0204.html. The newly, reorganized structure consists of six bureaus: the Media Bureau (formerly the Cable Services Bureau and the Mass Media Bureau); the Wireline Competition Bureau (formerly the Common Carrier Bureau); the Consumer and Governmental Affairs Bureau (formerly the Consumer Information Bureau); International Bureau; the Enforcement Bureau; and the Wireless Telecommunications Bureau. Id.
6 47 U.S.C. §§251-252 (2001); see also 47 U.S.C. §251(h) defining an "[i]ncumbent local exchange carrier" as a "local exchange carrier" that provided telephone exchange service on the date of enactment of the Telecom Act and was considered a member of the National Exchange Carrier Association under the Commission's rules or a successor or assign of such a member.
wireless channels with information carrying capability in ex-
broadband" networks as those capable of providing lines or
of the incumbents' services.7 Even more telling is that the RBOCs still control 96.8 percent of the local residential and small business markets and 82.5 percent of the local medium and large business markets.9

The slow development of local competition is not tied to a lack of effort or capital by the new competitive local exchange carriers ("CLECs").10 Encouraged by the pro-competitive principles of the Telecom Act, a large number of well-financed and experienced competitors entered the local telecommunications market.11 “From 1996 to 2000, the CLECs invested over $56 billion in broadband networks,12 more than either the cable companies or the RBOCs.”13 In addition to these intensive capital investments, CLECs created 94,000 new jobs as of 2000.14 The efforts of these new entrants have been impeded by the RBOCs. Despite the market-opening mandates of the Telecom Act,15 RBOCs have consistently engaged in anticompetitive practices, including the use of stall tactics, pricing maneuvers and supplying misleading information.16 For example, in March 2000, the Commission charged Bell Atlantic (now Verizon) with using delay tactics in New York, including failure to process orders from competitors resulting in service delays to competitors’ customers.17 As a result, the Commission fined Bell Atlantic $3 million.18 “The Bells have also used a variety of pricing maneuvers to thwart competition.”19 By charging competitors exorbitant rates for the necessary bottleneck network elements, the Bells make it too expensive for competitors to compete.20 Many competitors have been driven out of the market through such pricing tactics.

The sad reality is that the consumer is the real loser in this battle between the new, smaller en-

7 47 U.S.C. §271 (2001). In section 271 of the Telecom Act, Congress constructed a 14-point checklist that an incumbent local exchange carrier must satisfy in order to demonstrate that it has sufficiently opened its local markets to competition. See Jean F. Walker, Paved with Good Intentions: How InterLATA Data Relief Undermines the Competitive Provisions of the Act, 53 FED. COMM. L.J. 533, 543 (2001). The 14-point checklist addresses separate pieces of the market-opening provisions set out in sections 251 and 252 of the 1996 Act. A BOC cannot fulfill the checklist unless it shows that it has complied with all of the various aspects of the market-opening requirements outlined in sections 251 and 252.

8 See generally http://www.fcc.gov. As of April 1, 2002, the FCC had approved Verizon’s §271 applications for Connecticut, Massachusetts, New York, Pennsylvania and Rhode Island and SBC’s §271 applications for Arkansas, Kansas, Missouri, Oklahoma and Texas.


10 WOLCOTT, supra note 2.

11 47 U.S.C. §251(c) (2001). Congress contemplated three paths to competition in the local markets. First, competitors could compete through “interconnection,” or the building out of their own separate networks and then interconnecting to the incumbents’ networks. Second, competitors could compete through a combination of their own facilities and “ unbundling,” or leasing of unbundled network elements (“UNEs”), the individual piece parts of the local networks. Finally, competitors could compete through “ resale” of the incumbents’ services.

12 See 19 C.F.R. §1.7001 2002. The FCC has defined “broadband” networks as those capable of providing lines or wireless channels with information carrying capability in excess of 200 Kbps upstream and downstream. Id.; see also Hearing on Reviewing Competition and Antitrust Issues Relating to the Telecommunications Act Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition, 106th Cong. 13 (1999) (statement of former FCC Chairman William E. Ken-
trants and the Goliath-like RBOCs. The consumer bears the brunt of the RBOCs' monopolistic behaviors in being denied the fruits of competition and instead being relegated to poorer service quality, less innovative service offerings and higher prices. In *Goldwasser v. Ameritech*, one group of consumers decided not to take this lying down. Four individual residents of Illinois, Indiana, Michigan and Wisconsin joined together in a class action suit against Ameritech, the incumbent local exchange carrier in the region. The four plaintiffs, who were all subscribers to Ameritech's local phone service, alleged that Ameritech had "committed monopolistic acts in furtherance of an anticompetitive objective of maintaining a monopoly for local phone service in the five-state region." Citing 20 specific monopolistic behaviors, the plaintiffs claimed that Ameritech had not only failed to grant competitors access to its facilities, but also had affirmatively impeded competitors' ability to enter those markets served by Ameritech. The plaintiffs asserted that such practices violated the Telecommunications Act of 1996 and the antitrust laws under the Sherman Act. The district court dismissed the complaint on the basis that the plaintiffs lacked standing to sue under the antitrust laws. The U.S. Court of Appeals for the Seventh Circuit overturned the lower court's ruling on standing, but ultimately decided that the Telecom Act was controlling and the plaintiffs had failed to state a claim under the antitrust laws.

The *Goldwasser* decision has had a significant impact on the Telecom Act. *Goldwasser* vitiated the spirit of the Telecom Act by ignoring historical and legal precedent, the Act's express and implied antitrust savings clauses and the legislative history supporting the inclusion of those clauses. In the process, the decision emboldened many of the incumbent local exchange carriers to continue to flout the requirements of the Telecom Act without fear of negative repercussions. The *Goldwasser* decision has consequently introduced even more uncertainty into an already uncertain telecommunications marketplace. The question hovering in both legal courtrooms and corporate boardrooms is whether, in the wake of *Goldwasser*, antitrust enforcement has any role to play in constraining anticompetitive behavior among competitors in a marketplace governed by the regulatory mandates implemented under the Telecom Act. If this question is left unanswered, the competition game that was started by the Telecom Act may soon be over with the monopolies declared the winners. As a result, Congress must take action to stop the dominos from falling under the toppling influence of *Goldwasser*.

Congress recognized that this uphill battle to unlock a 100-year-old state-sanctioned monopoly required battles on two fronts—the telecommun-
cations policy front and the antitrust policy front. While the regulatory provisions of the Act detailed certain obligations, Congress recognized that the federal court system would also have an important role to play in ensuring the delivery of the expected benefits to consumers and therefore intended to preserve the role of the antitrust laws. This Comment will first provide a historical overview of the development of the antitrust laws, primarily the Sherman Act and the Telecommunications Act of 1996. This historical overview will demonstrate the harmonious coexistence of these two approaches. Next, this Comment will discuss the Seventh Circuit's decision in Goldwasser v. Ameritech and analyze the court's reasoning in its holding that the antitrust laws did not apply to anticompetitive behavior relating to obligations imposed by the Telecom Act. This Comment will subsequently show the divergent directions taken by the lower courts in interpreting Goldwasser, creating an overall environment of legal and regulatory uncertainty. Then, this Comment will demonstrate Goldwasser's incorrect application of the plain statutory language of the Telecom Act and its failure to heed historical and legal precedent, as well as extensive legislative history. As a result, this Comment will then assert the need for immediate congressional action to resolve the uncertainty and erosion of competition principles effected by Goldwasser. Finally, this Comment will discuss H.R. 1698, the “American Broadband Competition Act,” and demonstrate its viability as a potential Goldwasser remedy.

II. HISTORICAL OVERVIEW

A. The Sherman Act

With one sweep of his pen on July 2, 1890, President Benjamin Harrison granted federal courts the authority to develop a body of federal antitrust common law.32 The Sherman Act consists of two main provisions.33 Section 1 focuses on restrictive agreements, specifically wrongful contracts, trusts or conspiracies, which operate “in restraint of trade or commerce,” both nationally and internationally.34 Section 2 concentrates on the attempted or actual abuse of monopoly power, both nationally and internationally.35 Together, these two provisions were the first enunciation of federal antitrust policy.36

The passage of the Sherman Act in 1890 was motivated by the fear that unchecked monopolists, namely concentrated industrial goliaths such as Standard Oil and other trusts, would threaten capitalism and the operation of the free market.37 Senator Sherman, explaining the need for a check on such monopolists, stated that if we “not submit to an emperor, we should not submit to an autocrat of trade with power to both prevent competition and fix the price of any commodity.”38 Congress therefore enacted the Sherman Act to invest federal courts with the authority sufficient to ensure that no one “king” reigned “over the production, transportation and sale of any of the necessities of life.”39 Today, it is still accepted that the Sherman Act was enacted to pro-

34 15 U.S.C. §1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ”); see also John H. Shenefield & Irwin M. Steltzer, The Antitrust Laws: A Primer 14-15 (2d ed. 1996) (according to the authors, the presence of a “contract,” “combination,” or “conspiracy” is the “trigger . . . In the absence of some cooperative conduct or joint action involving at least two separate companies, this provision of the Sherman Act does not apply.”).
35 15 U.S.C. §2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ”); see also John H. Shenefield & Irwin M. Steltzer, The Antitrust Laws: A Primer 18 (2d ed. The AEI Press 1996) (1995) Id. at 18 (stating that “the section condemns not sheer size, but abusive conduct by a monopolist, or unilateral or collective efforts to engage in exclusionary or predatory conduct to obtain monopoly status”).
36 Bork, supra note 32, at 19.
37 See 21 Cong. Rec. 2455, 2460 (daily ed. Mar. 21, 1890) (statement of Sen. Sherman) (warning against “ . . . the concentration of capital into vast combinations to control production and trade to break down competition. These combinations already deny or control powerful transportation corporations and reach State authorities. They reach out their biarcean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.”).
38 Id. at 2457.
mote consumer welfare and competitive market-
places. Yet, while Congress gave the courts the authority to develop a body of antitrust law, it de-

.clined to set forth specific tools in the statute to
direct the courts’ accomplishment of that goal.

As a result, the applicability of the Sherman Act
was soon tested when the Supreme Court decided
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antitrust”
that the acquisition of a

companies constituted a “trust” in restraint of in-
holding companies, held that the acquisition of a
Supreme Court, applying the Sherman Act to
trust policy with its decision in

E. C. Knight Co.,
the first antitrust suit in 1895. In
Northern Securities Co. et al. v. United States.
In Northern Securities, the
Supreme Court, applying the Sherman Act to
holding companies, held that the acquisition of a
controlling interest in two competing railroad
companies constituted a “trust” in restraint of in-
terstate commerce.

The Court’s decision in Northern Securities set
the stage for “...the most important decisions in
antitrust”—the Standard Oil case and the Amer-
ican Tobacco case. In Standard Oil, the Court,
“preoccupied with abuses, predatory practices, co-
cercion, unnatural means of gaining and maintain-
ing market power,” ordered the breakup of the oil
company into more than 30 individual compa-
nies. However, the Court ruled that not all com-
binations violated the Sherman Act. Rather, only
those unreasonable ones that employed methods
with “the intent to drive others from the field and
to exclude them from their right to trade” were
illegal and in violation of the Sherman Act.

Echoing Senator Sherman’s original fears of un-
checked monopolists, Justice Harlan warned of the
“slavery that would result from aggregations of
capital in the hands of a few individuals and cor-

Similarily, in American Tobacco, the Court af-

irmed the lower court’s decision to dissolve
American Tobacco Company on the basis of
“wrongful acts” indicating intent to achieve a
monopolistic position. Writing for the majority,
Justice White justified the application of the Sher-
man Act, stating, “the danger which it was
deemed would arise to individual liberty and the
public well-being from acts like those which this
record exhibits ... led the legislative mind to con-
eceive and enact the Anti-trust act.” The fear of
misuse of monopoly power that guided the enactment
of the Sherman Act has likewise influenced
the Supreme Court in its development of a body
of federal antitrust common law.

In interpreting Section 2 of the Sherman Act,
courts have required a showing of two elements of
monopolization. In United States v. Grinnell Corp.,
Justice Douglas declared that in order for a single
firm to be a monopoly, a two-prong test must be
met: there must be “(1) the possession of monop-
oly power in [a] relevant market, and (2) the will-
ful acquisition or maintenance of that power as
distinguished from growth or development as a
consequence of a superior product, business ac-
umen, or historic accident.” The first step in as-

40  DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY 6
41  Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940)
(holding that due to the vagueness of the language of the
Sherman Act “courts have been left to give content to the
statute”); see also BORK, supra note 32, at 19 (describing
the consequential evolutionary development of the Sherman
Act).
43  Id.
44  Id. at 17 (specifying that the manufacture of sugar was
not “an attempt ... to monopolize commerce, even
though ... the instrumentality of commerce was necessarily
invoked”).
45  Northern Securities Co. et al. v. United States, 193
U.S. 197 (1904).
46  Id. at 338.
47  BORK, supra note 32, at 33.
whether such power significantly impedes competition.\textsuperscript{58} While courts have traditionally measured such monopoly power in the context of market share, they have struggled to define what constitutes a monopolistic market share.\textsuperscript{59} Generally, “a 75% market share is likely to permit or require an inference of market power.”\textsuperscript{60} Yet, a holder of such market share is not in \textit{per se} violation of section 2.\textsuperscript{61} Rather, in order to be found guilty of monopolizing or attempting to monopolize, “the monopolist must have acquired its monopoly by some improper conduct or course of conduct, or must have done something improper to maintain its power.”\textsuperscript{62} While mere possession of monopoly power does not amount to a violation under section 2, a willful attempt to acquire monopoly status or maintain monopoly power will violate section 2.\textsuperscript{63}

Courts therefore have also required a demonstration of the uses and abuses of monopoly power—the second prong of the test as enunciated by Justice Douglas in \textit{Grinnell}.\textsuperscript{64} For example, courts have determined that even monopolists have the right to refuse to cooperate with a competitor,\textsuperscript{65} however, “where a refusal to deal is beneficial to the monopolist only because it tends to destroy competition, it will be unlawful under section 2.”\textsuperscript{66} This theme was recently reiterated in \textit{United States v. Microsoft Corp.} where the court found that Microsoft’s use of exclusionary practices and predatory tactics to maintain its monopoly violated both Sections 1 and 2 of the Sherman Act.\textsuperscript{67} The court explained that Microsoft’s exclusive dealings are not unlawful solely because of their “anticompetitive effect of preserving Microsoft’s monopoly.”\textsuperscript{68} Rather, the court found Microsoft’s exclusive arrangements violated section 2 because they were not supported by any pro–competitive justification or intended to further any pro–competitive business ends.\textsuperscript{69}

Finally, if a refusal to deal involves an “essential facility,” courts have held monopolists to a stricter standard.\textsuperscript{70} A facility is considered essential “when it is both critical to the plaintiff’s competitive viability and the plaintiff is essential for competition in the marketplace.”\textsuperscript{71} The essential facilities doctrine first emerged in \textit{United States v. Terminal Railroad Assoc.},\textsuperscript{72} which “involved three different means of crossing the Mississippi when the government finally sued the combination” in 1905 under sections 1 and 2 of the Sherman Act.\textsuperscript{73} In order to establish liability under the essential facili-

\textsuperscript{58} \textit{Grinnell}, 384 U.S. at 570.

\textsuperscript{59} \textit{Id.} at 571. The market share was 87% in \textit{Grinnell}. \textit{Id.} However, there is no magic “market share” number. See, e.g., \textit{United States v. Aluminum Co. of Am.}, 148 F. 2d 416, 424 (2nd Cir. 1945), where Judge Learned Hand held that “it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not”; see also \textit{United States v. United Shoe Mach. Corp.}, 110 F. Supp. 295, 339 (D. Mass. 1953), \textit{aff’d per curiam}, 347 U.S. 521 (1954), where market share was 75-85%. \textit{But see} \textit{Estabishing the European Economic Community}, Mar. 25, 1957, art. 86, 298 U.N.T.S. 11, 48 (effective Jan. 1, 1958) (now renumbered Art. 82 by the Treaty of Amsterdam) (prohibiting “any abuse by one or more undertakings of a \textit{dominant position} within the common market or in a substantial part of it . . .”) (emphasis added).


\textsuperscript{61} \textit{See} BORK COMMUNICATION GROUP LLC, WHITE PAPER, THE \textit{CASE AGAINST MICROSOFT} (authored by Robert H. Bork) 419, 422 (“Size, even if it confers monopoly power, is not illegal if it is achieved by superior products, service, business acumen, or mere luck”) [hereinafter Bork, \textit{The Case Against Microsoft}]; see also \textit{Grinnell}, 384 U.S. at 571 (contrasting the deliberate acquisition or maintenance of monopoly power with “monopoly achieved as a result of historical accident, business acumen, or the like”).

\textsuperscript{62} Lynch, \textit{supra} note 60, at 295-96; see also \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}, 472 U.S. 585, 605 (1985); see also \textit{United States v. Aluminum Co. of Am.}, 148 F. 2d 416, 420 (2nd Cir. 1945).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Grinnell}, 384 U.S. at 570.

\textsuperscript{65} \textit{See} \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}, 472 U.S. 585 (1985).

\textsuperscript{66} Lynch, \textit{supra} note 60, at 297.

\textsuperscript{67} \textit{United States v. Microsoft Corp.}, 253 F.3d 34 (D.C. Cir. 2001). \textit{See also} Bork, \textit{The Case Against Microsoft}, \textit{supra} note 61, at 422 (“Microsoft has, and exerts, the power to exclude rivals by predatory tactics that do not reflect superior efficiency, tactics whose sole purpose is the destruction of rivals.”).

\textsuperscript{68} \textit{Microsoft} 253 F.3d at 87 (“A monopolist, like a competitive firm, may have a perfectly legitimate reason for wanting an exclusive arrangement with its distributors.”).

\textsuperscript{69} \textit{Id.} at 87-88.

\textsuperscript{70} \textit{See} \textit{MCI Communications Corp. v. AT&T.}, 708 F.2d 1081 (7th Cir. 1983) (relying on \textit{United States v. Terminal R. Ass’n.}, 224 U.S. 585, 605 (1985); see also \textit{Hearing on Monopoli-}


\textsuperscript{72} 224 U.S. 383 (1912).

\textsuperscript{73} Abbott B. Lipsky, Jr. and J. Gregory Sidak, \textit{Essential Facili-}
ities doctrine, courts have required the satisfaction of four elements of an essential facility.\textsuperscript{74} First, the defendant must have control of a facility essential to competition.\textsuperscript{75} Second, duplication of that facility must be impossible or impractical.\textsuperscript{76} Third, it must be feasible to provide access to the facility.\textsuperscript{77} And, finally, the defendant must have denied access to the facility in order to exclude competition and not for a legitimate business purpose.\textsuperscript{78}

The body of federal antitrust law that has developed since the enactment of the Sherman Act is thus rooted in the American principles of competition and innovation. Enforcement of the antitrust laws is necessary for such competition and innovation because enforcement efforts “provide an assurance to investors and entrepreneurs . . . that they will succeed or fail on the basis of the creativity and quality of their products and services, free from the pernicious effects of anticompetitive practices.”\textsuperscript{79} The American courts, who were first tasked with the job of developing our body of federal antitrust law and who continue to apply the antitrust laws today, must therefore be guided by the dual policy considerations of promoting competition\textsuperscript{80} on one hand and encouraging innovation on the other.\textsuperscript{81}

B. The Telecom Act

In enacting the Telecommunications Act,\textsuperscript{82} Congress was motivated by the same goals that inspired the enactment of the Sherman Act—consumer welfare and competitive marketplaces.\textsuperscript{83} Indeed, the purpose of the Act is “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”\textsuperscript{84} As a result, Congress made competition the driving force behind the Telecom Act.\textsuperscript{85} To serve that end, “the regulatory regime in the 1996 Act contains stringent requirements designed to open competition in local telephone service.”\textsuperscript{86} These requirements are enunciated in section 251 of the Act.\textsuperscript{87} Section 251(a) imposes a broad mandate on all telecommunications carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”\textsuperscript{88} To encourage competition specifically in the local exchange market, one of the last “market segments that have natural monopoly characteristics,”\textsuperscript{89} section 251(b) then imposes further duties on all local exchange companies.\textsuperscript{90} Finally, the ILECs bear additional burdens under section 251(c) in order to prevent them from manipulating their control of bottleneck facilities to strangle their competitors and frustrate the very intent of the Telecom Act.\textsuperscript{91} These additional duties include: “the duty to negotiate in good faith,”\textsuperscript{92} the duty “to interconnect,”\textsuperscript{93} the duty to provide nondiscriminatory ac-

\textsuperscript{74} MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.; see also Hearing on Monopolization, supra note 70, at 999.
\textsuperscript{79} Hearing on Reviewing Competition and Antitrust Issues Relating to the Telecommunications Act Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition, 106th Cong. 31 (1999) (statement of former FCC Chairman Reed E. Hundt).
\textsuperscript{80} See generally David Turetsky, Antitrust in a More Conservative Congress, 41 ANTITRUST BULL., 541, 542 (1996) [hereinafter Turetsky].
\textsuperscript{81} See generally 1 WILLIAM MEADE FLETCHER ET. AL., FLETCHER Cyclopedia of the Law of Private Corporations §4983.10 (perm. ed. rev. vol. 1999); see also Turetsky, supra note 80, at 542.
\textsuperscript{83} See id. at 56 (preamble).
\textsuperscript{84} Id.; see also, H.R. CONF. REP. No. 104-458, at 1 (1996) (stating that Congress intended to “provide for a pre-competitive, de-regulatory national policy framework designed to ac-
\textsuperscript{86} PRACTICING LAW INSTITUTE, TELECOMMUNICATIONS CONVERGENCE OVERVIEW 17 (2001).
\textsuperscript{88} See id. §251(a)(1).
\textsuperscript{90} 47 U.S.C. §251(b). These duties include the duty of resale, the duty of number portability, the duty of dialing parity, the duty of access to rights-of-way and the duty to reciprocal compensation. Id.
\textsuperscript{91} Id. See id. §251(c).
\textsuperscript{92} See id. §251(c)(1).
\textsuperscript{93} Id. §251(c)(2).
cess to network elements;94 the duty to provide telecommunications services for resale at wholesale rates;95 and the duty to allow for physical colocation of equipment.96

In order to encourage compliance on the part of the incumbents with the requirements of section 251, Congress fashioned a trade under section 271 by predating BOC entry into the long distance market on the satisfaction of the market-opening provisions of section 251.97 Former FCC Chairman William Kennard described this barter as "a simple yet clever proposition: in exchange for opening their local facilities to competitors, the 1996 Act provides the BOCs with the substantial reward of the long distance 'carrot.'"98

Under section 271, a BOC can petition the Commission on a state-by-state basis to provide in-region interLATA services.99 In order to obtain section 271 approval, though, the petitioning BOC must demonstrate to the individual state public utility commissions that they have complied with the 14-point competitive checklist, which directly incorporates the competitive provisions of section 251.100 The Commission, in consultation with the Attorney General, must then make a determination on the application within 90 days.101 Thus, while the Telecommunications Act may be a different means than the Sherman Act, they are both designed to accomplish the same end of competition.102 Recognizing this, Congress intended the two statutory schemes to coexist harmoniously. As a result, even though Congress stipulated specific behavioral guidelines intended to promote competition in the local exchange marketplace, Congress also affirmatively included an express antitrust savings clause.103 Section 601(b)(1) specifically provides that "nothing in this Act ... shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."104 Similarly, Congress incorporated an implied antitrust savings clause providing that "[t]his Act ... shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided."105 This antitrust savings clause is standard language used in other federal regulations to express the continued applicability of antitrust laws even when Congress seeks to impose more specific behavioral obligations to govern certain forms of competition. For instance, the language of section 601(b)(1) is identical to the language of the antitrust savings clause used in the Energy Policy Act of 1992, which states that certain sections relating to wholesale transmission services "shall not be construed to modify, impair, or supersede the antitrust laws."106 The standard language used in the express107 and implied108 anti-

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94 Id. §251(c)(3); see also id. §251(d)(2) (Congress mandated that, in deciding which network elements should be made available on an unbundled basis, the Commission must determine whether access to particular network element is "necessary" and whether requesting carrier would be impaired in providing service without access to particular element).
95 Id. §251(c)(4).
96 Id. §251(c)(6).
98 Hearing Before the House Comm. on the Judiciary on H.R. 1686 – The "Internet Freedom Act" and H.R. 1685 – The "Internet Growth and Development Act," 106th Cong. (2000) (statement of former FCC Chairman William E. Kennard). See also Hearing on Reviewing Competition and Antitrust Issues Relating to the Telecommunications Act Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition, 106th Cong. 22 (1999) (statement of former Assistant Attorney General of the DOJ Antitrust Division Joel I. Klein) (stating "how absolutely critical section 271 is to achieving the Act's market-opening goals ... One of the most ambitious aspects of the Act is that it requires and expects the incumbent local exchange carriers to assist competitors that wish ultimately to take away its customers. Imagine how much more difficult this process would be without the incentive of long distance entry for the Bell companies.").
100 See id. §271(c)(2)(B).
101 See id. §271(d)(3); see also §271 (d)(2)(A); see also Turetsky, supra note 80, at 554-55 ("the legislation also assigns the Antitrust Division a strong role in evaluating Bell Operating Company applications for entry into the long distance market, requiring that the FCC accord 'substantial weight' to the Division's evaluations.").
102 See, e.g., Turetsky, supra note 80 ("[A]ntitrust is a critical ally of competition -- it is not a tool to pick winners and losers, but rather a tool to ensure that competitive markets do so."); see also, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (an act "[t]o promote competition ... ").
104 Id.
trust savings clauses of the Telecom Act is based on the statutory precedents in the energy, electric utility and natural gas industries. Congress's clear intent in enacting the Telecommunications Act with an express antitrust savings clause was to ensure that a proper remedy was available to constrain certain anticompetitive behavior and that such behavior was not shielded from over 100 years of antitrust case law. The statutory construction of the Telecom Act and the legislative history surrounding its enactment demonstrate Congress's intent to preserve the role of the Department of Justice and the antitrust laws in opening local markets to competition.

C. Goldwasser

Goldwasser v. Ameritech was a federal class action suit brought against Ameritech on behalf of four local telephone service consumers in each of Ameritech's service regions. The plaintiffs blamed the lack of competition in the local telephone market on the exclusionary practices of Ameritech, which controlled more than "90 percent of the markets for local telephone service in its geographic areas." Citing 20 specific monopolistic behaviors that violated Section 2 of the Sherman Act and the Telecom Act, the plaintiffs claimed that Ameritech had not only affirmatively impeded competitors' ability to enter those markets served by Ameritech but also had failed to grant competitors access to its "so-called essential facilities." The plaintiffs claimed that such anticompetitive acts violated Section 2 of the Sherman Act by denying consumers a choice among competitive carriers and, as a result, raised

109 See generally James R. Atwood, Antitrust, Joint Ventures, and Electric Utility Restructuring: RTGs and Pools, 64 Antitrust L.J. 323, 325-28 (1996); see also Telecommunications Act §601(c)(1).

110 Goldwasser II, 222 F.3d at 392 ("Plaintiffs-appellants Richard Goldwasser, Michael Cohn, Eric Carter, and Richard Lozon are citizens of Illinois, Wisconsin, Indiana, and Michigan, respectively. Those states . . . are the . . . states in which defendant Ameritech provides local telephone service. The Goldwasser plaintiffs . . . are consumers of local telephone services in Ameritech's area.").

111 Goldwasser I, No. 97 C 6788, at 2.

112 Goldwasser II, 222 F.3d, at 394-95.

The complaint specifies 20 specific exclusionary or monopolistic practices . . . (1) Ameritech is not providing the same quality of service to its competitors as it provides to itself, in violation of §251. (2) Again in violation of §251, Ameritech has not given its competitors nondiscriminatory access to its operational support systems, nor has it given them access to unbundled elements of its systems on terms equivalent to those Ameritech enjoys. (3) Ameritech has failed to provide "dark fiber" as an unbundled network element, in violation of the 1996 Act. (4) Ameritech has failed to provide its competitors access to poles, ducts, conduits, and rights-of-way on a nondiscriminatory basis, in violation of §§251 and 271. (5) Ameritech has failed fully to unbundle its network elements, including local loops, local transport, and local switching, in violation of §251(c)(3). (6) Ameritech's competitors have experienced undue delays (presumably caused by Ameritech) in acquiring unbundled elements, and those delays have precluded them from offering services as attractive as Ameritech's. (7) The competitors have also experienced delays and discrimination as they have sought to gain access to unbundled loops, in violation of §251(c)(3). (8) Ameritech has failed to provide unbundled access to local transport interface transmission facilities on a discriminatory basis, in violation of §251(c)(3). (9) Ameritech has failed to provide local switching to competitors, in violation of §271(c)(2)(B)(vi). (10) Ameritech discriminates against competitors by requiring competitive LECs and competitors to pay originating and terminating access charges, when it cannot collect interstate access charges. (11) Ameritech has failed to offer or provide customized routing, which is required to be provided as part of unbundled local switching. (12) Ameritech has not provided dialing parity to competitors for services such as operator assistance ("0"), directory assistance ("411"), and repairs ("611"), in violation §271(c)(2)(b)(xii). (13) Ameritech has failed to provide access to its own 911 and emergency services on a nondiscriminatory basis, in violation of §§272(b)(3) and §271(c)(2)(B)(i). (14) Ameritech has continued to bill customers of competitors who have converted from Ameritech's services, and hence some customers are being double-billed, thereby harming the competitors' goodwill. (15) Ameritech has failed to provide interconnection between its network and those of competitors that is equal to the interconnections it gives itself, in violation of §§251(c)(2) and 271(c)(2)(B)(i). (16) Ameritech has not complied with §272(b)(3) of the 1996 Act, which requires a BOC and its interLATA affiliates to have separate officers, directors, and employees. (17) Ameritech has failed publicly to disclose all transactions with §272 affiliates, in violation of §272(b)(5). (18) Ameritech has refused to sell to its competitors, on just, reasonable, and nondiscriminatory terms, access to components of its network on an unbundled or individual basis. (19) Ameritech has refused to sell to its competitors local telephone services at wholesale prices that are just, reasonable, and nondiscriminatory, which prevents the competitors in turn from offering attractive resale prices to consumers. (20) Ameritech has refused to allow its competitors to connect with its local telephone network on just, reasonable, and nondiscriminatory terms.

113 Goldwasser II, 222 F.3d, at 394 (including "its telephone lines, equipment, transmission, and interconnection stations in [Ameritech's] markets." The Supreme Court has held that the incumbents' competitors are not able to duplicate those facilities.). See, e.g., AT&T v. Iowa Board of Utilities, 525 U.S. 366 (1999).
prices for local telephone service.\textsuperscript{114} In addition, the plaintiffs claimed that these anticompetitive acts violated mandatory access provisions of the Telecommunications Act.\textsuperscript{115} According to the plaintiffs, these violations "have restrained and stifled any meaningful competition for local telephone services in the relevant markets . . . and have perpetuated its monopolization of local telephone services."\textsuperscript{116} The plaintiffs therefore sought the standard antitrust remedy of treble damages and declaratory and injunctive relief.\textsuperscript{117}

The district court dismissed the case on the basis of three rationales. First, the court held that the "filed rate" doctrine first recognized in \textit{Keogh v. Chicago & N.W.R. Co.} bars recovery of damages based upon claims of overcharging.\textsuperscript{118} Relying on \textit{In Re Wheat Rail Freight Rate Antitrust Litigation},\textsuperscript{119} the court found that such claims of overcharging were subject to the filed rate doctrine because the remedy sought by the plaintiffs was linked to the allegedly inflated filed rates.\textsuperscript{121} Second, the court held that plaintiffs did not have standing to bring suit to require Ameritech to comply with the market-opening provisions of the Telecom Act. According to the court, such "claims could severely threaten the delicate balance that Congress has struck in attempting to ease the transition of the telecommunications industry into a competitive marketplace."\textsuperscript{122} Finally, the court held that the Telecom Act establishes no affirmative duties to consumers; therefore, plaintiffs have no cause of action based upon breach of these duties under the Telecom Act.\textsuperscript{123} On the basis of these three holdings, the court subsequently granted Ameritech's 12(b)(6) motion to dismiss the case for failure to state a claim.

Even though the Seventh Circuit disagreed with the lower court on the standing issue, a three-judge panel of the Seventh Circuit affirmed the remainder of the lower court's decision. In overturning the lower court's finding that the plaintiffs lacked standing, the Seventh Circuit first found that the plaintiffs were "direct purchasers . . . forced to pay an alleged monopolistic overcharge."\textsuperscript{124} The Seventh Circuit found that the plaintiffs, as subscribers of Ameritech local telephone service,\textsuperscript{125} therefore satisfied the threshold standing requirement set forth in \textit{Illinois Brick Co. v. Illinois.}\textsuperscript{126} In addition, the court found that the plaintiffs had described the proper antitrust harm that the antitrust laws are designed to prevent\textsuperscript{127} by asserting the alleged consequential increased prices of local telephone service.\textsuperscript{128}

Despite making an affirmative finding of standing, the Seventh Circuit ultimately rejected the plaintiffs' claims on the basis that the alleged violations of the Telecom Act were beyond the reach of the Sherman Act. The court held that that the Telecom Act imposed "more specific and far-reaching obligations" than those imposed by antitrust laws.\textsuperscript{129} "The fundamental fallacy in the plaintiffs' theory is that the duties the [Telecom Act] imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices."\textsuperscript{130} The court based its holding on its interpretation that Congress had the opportunity to adopt an antitrust scheme to achieve competition in the local markets.\textsuperscript{131} Yet, according to the

\textsuperscript{114} \textit{Id.} at 392.
\textsuperscript{115} \textit{Id.} at 399. (Plaintiffs accused Ameritech of "failing to comply with its myriad duties under §§ 251, 252 and 271 of the telecommunications law.").
\textsuperscript{117} \textit{Id.} at 21.
\textsuperscript{118} 260 U.S. 156 (1922). The Court in \textit{Keogh} held once rates had been filed with and approved by the Interstate Commerce Commission by the Commission, those filed rates were deemed to be "reasonable and nondiscriminatory." \textit{Id.} at 161; \textit{see also County of Stanislaus v. Pacific Gas & Elec. Co.}, 114 F.3d 858, 862 (9th Cir. 1997), cert. denied, 522 U.S. 1076 (1998) (upholding the filed rate doctrine and explaining that "[s]ince the 1990s, the 'filed rate' or 'filed tariff' doctrine has barred antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services").
\textsuperscript{119} \textit{Goldwasser II}, 222 F.3d, at 402.
\textsuperscript{120} 759 F.2d 305 (7th Cir. 1985).
\textsuperscript{121} \textit{Goldwasser II}, 222 F.3d, at 402.
\textsuperscript{122} \textit{Goldwasser I}, No. 97 C 6788, at 10.
\textsuperscript{123} \textit{Id.} at 11.
\textsuperscript{124} \textit{Goldwasser II}, 222 F.3d, at 398.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} 431 U.S. 720 (1977) (holding that suits by indirect purchasers were barred).
\textsuperscript{127} Associated General Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 539 (1983) (Supreme Court held that plaintiff lacked standing because it "was neither a consumer nor a competitor in the market in which trade was restrained."") The \textit{Goldwasser II} plaintiffs, in contrast, were consumers in the relevant markets where the alleged monopolistic acts by Ameritech occurred.
\textsuperscript{128} \textit{Goldwasser II}, 222 F.3d, at 398 (holding that plaintiffs had made the requisite antitrust injury showing).
\textsuperscript{129} \textit{Id.} at 401.
\textsuperscript{130} \textit{Id.} at 399.
\textsuperscript{131} \textit{See id.} (holding that "Congress could have chosen a simple antitrust solution to the problem of restricted competition in the local markets").
court, in enacting the Telecom Act, Congress chose instead to create a regulatory scheme based on chutes and ladders through which the incumbent monopolist must jump.\textsuperscript{132} The court stated that these “kinds of affirmative duties to help one’s competitors . . . do not exist under the unadorned antitrust laws.”\textsuperscript{138} Because the requirements under the Telecom Act are more specific and onerous than those found in any antitrust laws, the court refused to apply the antitrust laws to such violations.\textsuperscript{134}

The court thus rejected the plaintiffs’ claims that the breaches of duties under the Telecom Act are tantamount to antitrust violations, asserting instead that it would be both “illogical and undesirable” to hold that such a failure to comply with the Telecom Act necessarily constitutes an antitrust violation.\textsuperscript{135} First, this conclusion would be illogical because the link between a violation of a statutory regime and a monopolistic practice may be too attenuated to be properly redressed through antitrust means.\textsuperscript{136} Second, this inference would be undesirable because the “antitrust laws would add nothing to the oversight already available under the 1996 law.”\textsuperscript{137} According to the court, the enforcement structure set forth in the Communications Act that charges the Commission with specific oversight responsibility is more than adequate to deal with such alleged anticompetitive practices.\textsuperscript{138}

Finally, in considering whether any of the plaintiffs’ allegations could amount to a “freestanding antitrust claim,” the court held that the plaintiffs’ antitrust claims were too “inextricably linked” to be divorced from the claims based on the Telecom Act.\textsuperscript{139} Because the Telecom Act is more specific, the court determined it must trump the more general antitrust laws when both are implicated in the same complaint.\textsuperscript{140} While the court explicitly noted that the Telecom Act did not confer “implied immunity on behavior that would otherwise violate the antitrust law,” the court did hold that the Telecom Act must also enforce any duty that arises under the Telecom Act.\textsuperscript{141} Therefore under \textit{Goldwasser}, consumers and competitors, and potentially the Antitrust Division of the Department of Justice (“DOJ”), are barred from using antitrust remedies to redress violations of the Telecom Act in non-competitive markets.\textsuperscript{142} The court indicated that antitrust remedies should be reserved for deregulated, competitive markets, such as the long-distance market created after the government and new market entrants successfully broke up AT&T’s monopoly.\textsuperscript{143} Contrasting the state of these competitive markets with the current status of the local exchange markets, which are still subject to the Telecom Act’s “detailed regulatory regime,” the court held that “[a]t some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore.”\textsuperscript{144}

D. Split in Lower Courts has Created Legal and Regulatory Uncertainty

Several district courts, in interpreting the specific boundaries of these two legislative schemes, have rejected the holding of \textit{Goldwasser} and allowed the plaintiffs’ antitrust claims to stand. These decisions have effectively denied those defendants any de facto antitrust immunity.\textsuperscript{145} In

\textsuperscript{132} \textit{Id.} (finding that Congress, “in an effort to jump-start the development of competitive local markets . . . imposed a host of special duties on the ILECs”).

\textsuperscript{133} \textit{Id.} at 399-400 (referring to special ILEC-specific requirements, FCC and state public utility commissions’ oversight, and “a system of negotiated agreements” to accomplish local competition).

\textsuperscript{134} \textit{Id.} at 401.

\textsuperscript{135} \textit{Id.} at 400.

\textsuperscript{136} \textit{Id.} at 400 (citing numerous examples of other laws that dominating firms could violate regardless of its dominating market position, including an agricultural firm that violates safety or cleanliness food processing regulations; a computer processor firm that violates employment discrimination prohibitions; or a pharmaceutical firm that violates the Food and Drug Administration’s rules applicable to new drugs).

\textsuperscript{137} \textit{Id.} at 401.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{See id.} (holding that the “1996 Act is . . . more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field”).

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at 401-02.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 401-02.

CalTech Int'l Telecom Corp v. Pacific Bell, the court held that "the Telecom Act does not 'impair' the application of the antitrust laws to the telecommunications industry."146 As a result, the court announced its intention to judge CalTech's allegations that Pacific Bell had failed "to provide the facilities and services mandated by the Telecom Act" and CalTech's contentions that Pacific Bell's facilities were "essential facilities" by the "standards of the antitrust laws."147 The court simply demanded the required Sherman Act showing. Ultimately, the jury reached a verdict for the plaintiff in the amount of $1.4 million.

Similarly, the district court in Stein v. Pacific Bell denied a second Goldwasser motion proffered by Pacific Bell.148 The court dismissed the plaintiffs' antitrust claims for denying essential facilities and monopoly leveraging; however, the court allowed the plaintiffs' antitrust claims based on violations of an interconnection agreement under the Telecom Act to stand.149 The court distinguished its holding from Goldwasser on the basis of the plaintiffs' allegations of violations in "bad faith and . . . other exclusionary practices."150 According to the court, the Goldwasser court never addressed the issue of "whether violations of the 1996 Act, if done in a 'predatory' manner . . . can make up an independent basis for liability under the Sherman Act."151 The Stein plaintiffs, in contrast to the Goldwasser plaintiffs, presented the court with a satisfactory showing of attempted monopolization through allegations of "predatory behavior."152 In denying the defendant's motion to dismiss, the court reasoned "Stein has alleged the type of conduct that exceeds a monopolist's right to deal or not to deal with competitors, in violation of section 2 of the Sherman Act."153 The district court therefore rejected Pacific Bell's expansive reading of Goldwasser and allowed the plaintiffs' antitrust claims to stand.

Likewise, in Electronet Intermedia Consulting, Inc. v. Sprint-Florida, Inc., the district court denied the ILEC's motion to dismiss.154 A footnote in the order distinguished the case from Goldwasser.

It is true, as Sprint notes, that a violation of the [Telecom Act], without more, does not an antitrust violation make. In the case at bar, however, unlike in Goldwasser, there are allegations of misconduct separate and apart from any alleged violations of the [Telecom Act] (internal citations omitted).155

The Florida district court therefore refused the defendant's requests for antitrust immunity and allowed Electronet's claims under the antitrust laws to go forward.156 Similarly, the court in Covad Communications Co. v. Pacific Bell, a pre-Goldwasser decision, also found sufficient evidence was presented by Covad to deny Pacific Bell any sort of antitrust immunity.157 The court held that the "plaintiff has sufficiently alleged that Pacific Bell has imposed costly and unnecessary conditions upon access to its network, and intentionally delayed performance of obligations under the agreement, in an effort to prevent it from entering the market."158

The court in Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp., on the other hand, granted Bell Atlantic's Goldwasser motion to dismiss; however, it did not entirely rule out the possibility of an antitrust claim for violation of the Telecom Act.159 In that case, the plaintiff "failed to allege any willful acquisition or maintenance of monopoly power by Bell Atlantic."160 Thus, the court held that Bell Atlantic's violation of section 251

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147 CalTech Int'l Telecom Corp. v. Pacific Bell, Order Regarding Issues for Trial, N.D. Cal. Case No. C-97-2105-CAL (order filed Oct. 25, 2000); see also Consolidated Gas. Co. of Fla., Inc. v. City Gas Co. of Fla., 880 F. 2d 297, 301 (11th Cir. 1989) (holding that "[p]ervasive regulation will not protect an industry from antitrust liability for 'conduct that is voluntarily initiated'") (quoting MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1103 (7th Cir.), cert denied, 464 U.S. 891 (1983)).
149 Id. at *10-11.
150 Id.
151 Id.
152 Id.
153 Id. at *7.
155 Id. at 2, n.1.
156 Id. at 2.
158 Id. at *32-33.
160 Id. at 741-42 (holding that the plaintiff failed to establish the second element of a Sherman Act §2 claim, the willful acquisition or maintenance of monopoly power, in pointing "to only one act or series of acts taken by Bell Atlantic to maintain its monopoly power").
did not equate with a violation of antitrust laws but left the door open to the possibility of a stronger showing of unlawful use of monopoly power that would sustain a Sherman Act claim.

The domino effect of the Goldwasser decision, though, is clearly evident by other recent decisions that have followed Goldwasser’s lead. Relying on Goldwasser, the Nevada district court in MGC Communications, Inc. v. BellSouth Telecommuns., Inc. rejected attempts by MGC Communications, Inc., d/b/a Mpower Communications Corp. (“Mpower”), to “enforce BellSouth’s obligations under the Telecommunications Act through the tool of an antitrust suit.” The court recited a summary of Goldwasser, and concluded, “[i]n this case, as in Goldwasser, Mpower’s claims are based on alleged violations of the Telecommunications Act or FCC orders implementing the Telecom Act.” As a result, the court found that the violations alleged by Mpower did not amount to a violation of the Sherman Act. Furthermore, the court held that Mpower’s claims that BellSouth denied Mpower reasonable access to essential facilities are “[a]s in Goldwasser, ... inextricably intertwined to the claims under the Telecom Act and, even if they were not, the Telecom Act is more specific legislation that takes precedence over the general antitrust legislation.”

Despite the fact that Goldwasser involved a class of consumers, whereas this case featured a competitor suing the incumbent, the district court still extended the Goldwasser holding to reach the same result of de facto immunity for competitor suits alleging antitrust violations in the form of anticompetitive actions.

Similarily, Intermedia filed suit against BellSouth alleging that BellSouth has been monopolizing the telecommunications industry by denying competitors sufficient access to essential facilities. The district court initially interpreted Goldwasser narrowly by finding that the Telecom Act and the antitrust laws were independent from each other rather than co-dependent. It held that “any behavior that can be the basis for an antitrust claim before the creation of the [Telecom Act] still can be the basis of an antitrust claim after the creation of the [Telecom Act].” Nevertheless, the court ultimately applied Goldwasser broadly to dismiss Intermedia’s antitrust claims holding that “all of [Intermedia’s] antitrust claims must fail because they are ... based on [BellSouth’s] alleged violations of the [Telecom Act] ...” Thus, just as the Nevada district court did in MCG Communications, Inc. v. BellSouth Telecommuns., Inc., the court in Intermedia applied the holding of Goldwasser to summarily bar competitors’ claims of antitrust violations based on exclusionary conduct that also violates the Telecom Act.

Finally, the Richmond, Virginia district court in Cavalier Telephone, LLC v. Verizon most recently used the Goldwasser decision to grant Verizon’s motion to dismiss on the basis that Cavalier’s allegations “merely represent(ed) violations of the 1996 Act dressed up in antitrust garb.” The court, citing Goldwasser’s holding that “the 1996 Act creates ‘more specific and far-reaching obligations’ than those embodied in § 2 of the Sherman Act,” consequently held that “Cavalier cannot state a claim under § 2 of the Sherman Act if it alleges violations of affirmative duties created by the 1996 Act.” Thus, despite both the Goldwasser court’s and the Cavalier court’s explicit recognition of the harmonious nature of the Telecom Act and the antitrust laws, both deci-

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162 Id. at 1352.
163 Id.
164 Id. at 1352.
165 Intermedia Communications, Inc. v. BellSouth Telecommuns., Inc., No. 8:00 Civ-1410-T-24(C), slip op. (M.D. Fla. Dec. 15, 2000).
166 Id. at 6, relying on AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, vacated on other grounds, 223 F.3d 1324 (11th Cir. 2000).
167 Intermedia Communications, Inc. v. BellSouth Telecommuns., Inc., No. 8:00 Civ-1410-T-24(C), slip op. at 6 (M.D. Fla. Dec. 15, 2000).
168 Id. at 8.
170 Intermedia Communications, Inc. v. BellSouth Telecommuns., Inc., Brief of the Appellant Intermedia Communications, Inc., No. 01-10224-JJ, (11th Cir. Mar. 20, 2001) at 4 (describing BellSouth’s anticompetitive conduct) and at 28 (describing the lower court’s reliance on Goldwasser to dismiss Intermedia’s antitrust claims).
172 Id. at 5 (quoting Goldwasser II, 222 F.3d at 401).
173 Id. at 5.
174 See id. at 4 (holding that "the 1996 Act is not at odds with federal antitrust laws ... "); see also Goldwasser II, 222 F.3d at 401 (holding that the duties on ILECs imposed by the Telecom Act "do not conflict with the antitrust laws").
dictions effectively foreclose the availability of antitrust remedies for any violations that "are grounded in the 1996 Act."\textsuperscript{175}

The split in the district court opinions evidences the legal confusion circulating in the wake of Goldwasser and the negative domino effect the decision has had on later court decisions. The varying legal interpretations of the Goldwasser decision throughout the district courts reveal the shaky foundation on which the decision stands and demonstrates the inherent inconsistencies in statutory interpretation and intent, legal precedent and accepted public policy. As a result, additional review and an affirmative resolution are needed to settle the legal and regulatory uncertainty currently surrounding this issue and to halt the toppling effect of the Goldwasser decision before it is too late.

III. GOLDWASSER GOT IT WRONG

A. Goldwasser Ignored A Long History of Reliance on Antitrust Protections and Enforcement

The Goldwasser court ignored the historical role that the government and federal antitrust authorities\textsuperscript{176} have played in both the development of United States telecommunications policy and in curbing industry abuse of monopoly power. In fact, during the pre-Modification of Final Judgment\textsuperscript{177} phase through the passage of the Telecom Act, the Department of Justice and the federal court system were more influential in shaping the telecommunications industry than the Commission.\textsuperscript{178} In 1974, the Antitrust Division of the Department of Justice initiated suit against AT&T for a broad litany of antitrust violations stretching back 70 years.\textsuperscript{179} Assistant Attorney General William Baxter found "the source of AT&T's monopoly power to be in its control over the local networks, which had been protected from competition as a result of state regulation for over seventy years."\textsuperscript{180} In United States v. AT&T, the court considered the overlapping regulatory schemes:

[T]he Antitrust Division faced an initial burden of establishing that AT&T's conduct was not exempt from the antitrust laws by virtue of FCC regulation. In fact, the FCC generally supported the Division's assertion of antitrust jurisdiction and, with this help, the government was able to defeat preliminary jurisdictional motions.\textsuperscript{181}

While Judge Greene specifically addressed the issue of whether the communications statutes conferred an implied immunity from antitrust law, he "held that immunity could not be implied from such regulation."\textsuperscript{182} The court affirmed the resulting consent decree entered into by all the parties.

\textsuperscript{175} Cavalier Telephone, No. 3:01CV736, at 10.

\textsuperscript{176} See William E. Kovacic, Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?, ANTITRUST BULL. 505, 508 (1996) ("the federal antitrust statutes and court decisions interpreting them have created four major enforcement agents: two federal agencies (the DOJ and the FTC), the state attorneys general, and private parties such as businesses and consumers").

\textsuperscript{177} Modification of Final Judgment, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see, e.g., Jim Chen, The Legal Process and Political Economy of Telecommunications Reform, 97 COLUM. L. REV. 855, 852 (1997) (the divestiture agreement, which broke up AT&T into seven RBOCs, has been called "the crowning achievement of American telecommunications law's first century").

\textsuperscript{178} Practicing Law Institute, Telecommunications Convergence Overview 2001 (2001); see, e.g., Lawrence A. Sullivan, Elusive Goals Under the Telecommunications Act: Preserving Long Distance Competition Upon Baby Bell Entry and Attaining Local Exchange Competition: We'll Not Preserve the One Unless We Attain the Other, 25 SW. U. L. REV. 487, 527 (1996) ("The lack of capacity of regulators to deal with [anticompetitive] tactics is emblematic of the pre-MF period. The FCC's failure to inhibit such practices through regulatory means was documented at the trial of DOJ's case against AT&T").

\textsuperscript{179} United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) (complaint filed Nov. 20, 1974), aff'd sub. nom. Maryland v. United States, 460 U.S. 1001 (1983). In addition to the monumental divestiture of AT&T, the judiciary also filed over 40 private antitrust suits against AT&T.


\textsuperscript{181} Donald L. Baker, Government Enforcement of Section 7, 61 NOTRE DAME L. REV. 898, 916 (1986).

\textsuperscript{182} George J. Alexander, Antitrust and the Telephone Industry After the Telecommunications Act of 1996, 12 SANTA CLARA COMPUTER & HIGH TECH L.J. 227, 244 (1996); see also United States v. American Tel. & Tel. Co., 461 F. Supp. 1314, 1321-22 (D.C. Cir. 1978) (holding that "[t]he Supreme Court has repeatedly noted that 'repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions'") (quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 372). In this case against AT&T, the court also explained in a footnote that "[e]ven when the regulation is 'pervasive,' and the precise conduct attacked in an antitrust suit is being regulated, an immunity will be found only if the antitrust remedy conflicts with rather than complements the enforcement efforts of the regulatory agency." Id. at 1326, n.36 (citing Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977).
in 1982 in the Modification of Final Judgement ("MFJ").

The problem in 1974 of "attempted entry of competing telephone companies" that was being barred by AT&T is similar to the one that is at the heart of Goldwasser.\(^{183}\) Yet despite the history of judicial intervention in the three previous antitrust settlements with AT&T,\(^{184}\) the court in Goldwasser was unwilling to step in likewise against Ameritech.\(^{185}\) Despite citing the AT&T success story and pointing to the long-distance industry as a model of competition, the court overlooks the fact that the antitrust case played an instrumental role in achieving that success.\(^{186}\) The Goldwasser court believed that this "success of the companies that challenged AT&T's hegemony over long distance shows that" competition could similarly be achieved in the local exchange market.\(^{187}\) This faulty premise overlooks the fact that "the development of local exchange competition is simply an order of magnitude more complicated, more labor-intensive and more capital-intensive than was the development of long distance competition."\(^{188}\) In its historical narrative describing the events leading up to the passage of the Telecom Act, the court recognized the applicability of antitrust laws in the context of the AT&T monopoly breakup. However, when comparing the long-distance and local marketplaces and touting the success of the long-distance industry competitors, the court ignored the "sheer complexity of the task" of breaking into the local market as compared to entering the long-distance market.\(^{189}\) Even more importantly, the Goldwasser court ignored the plain fact that the long-distance companies achieved their success only after the 1982 settlement of the government's antitrust suit against AT&T, and the resulting consent decree, broke up the AT&T monopoly by legally forcing a separation between AT&T's long lines and AT&T's local exchange companies in order to ensure MCI and other long distance companies had access to the local network infrastructure.\(^{190}\)

### B. Goldwasser Ignored the Plain Language of the Telecom Act

The Goldwasser court also ignored the plain language of the Act. The 1996 Telecommunications Act expressly preserved the relevance and applicability of the antitrust laws within a new statutory scheme. The antitrust savings clause states, "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."\(^{191}\) Congress, through the plain language of the statute, forbade any subversion of the antitrust laws. The Seventh Circuit in Goldwasser ignored this express recognition of the ongoing applicability of the antitrust laws in the telecommunications regulatory arena, as United States Attorney General John Ashcroft recently testified:

> In the enactment of the 1996 telecommunications reform measures, the Congress expressed its will and intent with very substantial clarity with a savings clause indicating that the antitrust prerogatives that inure to the enforcement authorities would remain in place. When the [Goldwasser court] . . . wrote an opinion which was interpreted to mean this was no longer the case, we felt it very important that the [DOJ] again reiterate what the Congress had explicitly, in our judgment, made clear in the 1996 Act.\(^{192}\)

Congress therefore expressly preserved the role of antitrust law to assist in the achievement of the objectives of the Telecom Act with the inclusion

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\(^{185}\) Goldwasser II, 222 F.3d at 390.

\(^{186}\) Id. at 399. Statistics show that since 1982, "long-distance prices for residential customers have declined sixty-six percent, in real terms; minutes of use have increased dramatically; and there are now literally hundreds of long distance carriers from which to choose." John H. Shenefield, *Antitrust: The Next One Hundred Years*, 70 *ST. JOHN’S L. REV.* 189, 203 (1996).

\(^{187}\) Goldwasser II, 222 F.3d at 390.


\(^{189}\) Id.


of a specific antitrust savings provision. Furthermore, in light of the Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., neither the courts nor agencies can substitute their own interpretations of such clear language. The Supreme Court has held that when Congress has clearly pronounced its statutory intent in the plain language it chooses, this pronouncement effectively binds both the courts and government agencies.

In addition to the inclusion of this express provision, the architects of the Act continued to implicitly preserve the applicability of federal antitrust laws with the additional clause "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such act or amendments." Thus, in stating that "[t]he 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field," the Goldwasser court clearly ignored the congressional pronouncement that nothing in the Telecom Act shall "be construed to modify, impair or supersede Federal . . . law." Despite the plain language of the statute forbidding such action, the Seventh Circuit effectively gave antitrust law the backseat to the Telecommunications Act and conferred antitrust immunity upon those companies whose behavior is so anticompetitive that it not only violates the Telecom Act but also is tantamount to violation of the antitrust laws. Goldwasser therefore ignored the Telecom Act's clear mandate that the provisions of the Communications Act and the antitrust laws are both to be used as tools to deter and arrest anticompetitive conduct.

C. Goldwasser Ignored the Legislative History of the Telecom Act

Even if there was some question as to the plain language of the statute, the legislative history surrounding the Telecom Act alone demonstrates that both the legislative and the executive branches of the government intended to protect the applicability of the antitrust laws. In the floor debate preceding the passage of the Telecom Act, members of Congress repeatedly emphasized the continuing role that antitrust laws must play, explaining that "[r]elying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry." This sentiment was echoed by Senator Thurmond, Chairman of the Senate Judiciary Committee's Antitrust, Business Rights and Competition Subcommittee, one week before the signing of the Act:

[T]he unequivocal antitrust savings clause . . . explicitly maintains the full force of the antitrust laws in this vital industry . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation it fosters, can flourish to benefit consumers and the economy.

Then, on the day of the signing of the Telecom Act, the Executive Branch reaffirmed the importance of the antitrust laws in helping to achieve the goals of the Telecom Act. President Clinton explicitly applauded the antitrust savings clause, stating, "the Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully." The legislative record clearly demonstrates both the legislative and executive branch recognition of the past role of the

194 Id.; see also William F. Fox, Jr., Understanding Administrative Law 412 (Matthew Bender & Co., Inc. 3rd ed. 1997) (1986) (stating that under the Chevron doctrine, if Congress has directly addressed the matter in question, then "both agency and courts must defer to the Congressional position irrespective of their own views on the subject").
196 Goldwasser II, 222 F.3d at 401.
198 Goldwasser II, 222 F.3d at 401-402.
antitrust laws in transforming traditional monopolistic markets into competitive ones and the intent of both government branches that the antitrust laws continue to play that role.

Even more specifically, however, Congress discussed the future applicability of the antitrust laws in the newly envisioned deregulated telecommunications marketplace. The record demonstrates congressional recognition of the critical role of the antitrust laws in prying open the traditional Bell monopolies:

- The bill contains an all-important antitrust savings clause which ensures that any and all . . . anticompetitive activities are fully subject to the antitrust laws. . . .
- And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers.203

The legislative history of the Telecom Act thus clearly supports Congress’s intent that the antitrust laws be applied in conjunction with the deregulatory principles of the Telecom Act to achieve a competitive telecommunications market. As shown by the affirmative considerations of both the antitrust laws in general and the antitrust savings clause specifically, Congress did not intend for the Telecom Act to preempt antitrust laws and confer antitrust immunity upon the incumbent local exchange monopolies.

The Goldwasser court, however, ignored such considerations in concluding that only after the Commission makes the determination that local markets are sufficiently competitive can “the transitional regulatory regime . . . be dismantled and the background antitrust laws can move to the fore.”204 Perhaps predicting such a challenge, Senate Commerce Committee Chairman and Telecommunications Act Conference Committee Chairman Larry Pressler stated on February 1, 1996 that the Telecom Act “does not affect our antitrust laws. The antitrust laws stay in place.”205

Contrary to the court’s opinion in Goldwasser that the antitrust laws are supplanted by the Telecom Act and should only be triggered once a market has become sufficiently competitive, the legislative record thus confirms congressional intent that antitrust laws should play a major and continuing role in keeping the Bell incumbents’ monopolistic practices in check.206

Furthermore, Goldwasser appoints the Commission as the sole government agency responsible for implementing the Telecom Act.207 However, the legislative history of the Telecom Act demonstrates congressional intent that both the FCC and the DOJ guide such implementation.208 Throughout legislative debates, Congress recognized the historical role that the DOJ had played in acting as our “country’s antitrust expert.”209 Similarly, Congress acknowledged the successful, historical role that antitrust laws played in introducing competition to stranded markets.210 Because of this established DOJ role and the traditional prominence of antitrust laws, Congress explicitly stated that the Telecom Act “does not disrupt the Nation’s antitrust law and does not change the DOJ’s role in policing unfair competition and predatory pricing.”211 The antitrust laws therefore remain in effect as one of the DOJ’s primary policing tools.

Furthermore, the Goldwasser court established that the more specific rules of the Telecom Act displaced the antitrust laws.212 Congress, however, specifically addressed the applicability of the antitrust laws, despite the existence of FCC regulations:

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204 Goldwasser II, 222 F.3d at 401-02.
206 Goldwasser II, 222 F.3d at 399-400.
207 Id. at 399 (Congress “entrusted supervision of those duties to the FCC and the state public utility commissions . . .”).
208 See, e.g., 142 CONG. REC. S687-01 (Feb. 1, 1996) (statement of Sen. Hollings) (“the Department of Justice was protected in the sense that what we did was have the savings clause for all antitrust laws included, positive language, and the substantial weight of the Department of Justice be given by the Federal Communications Commission in their decision”).
209 See 142 CONG. REC. H1157 (Feb. 1, 1996) (statement of Rep. Hyde) (“the conferees acknowledge the long experience and considerable expertise [the DOJ] has developed in this field”); see also 142 CONG. REC. S698 (Feb. 1, 1996) (statement of Sen. Kerrey) (“[The Antitrust Division has unrivaled expertise in assessing marketplace effects, particularly so in telecommunications, where it has been deeply involved continuously for more than 20 years”).
210 See, e.g., 142 CONG. REC. H1171 (Feb. 1, 1996) (statement of Rep. Conyers) (“Antitrust law is synonymous with low prices and consumer protection—and that is exactly what we need in our telecommunications industry”).
212 Goldwasser II, 222 F.3d at 401 (“The 1996 Act imposed duties on the ILEC that are . . . more specific and far-reaching obligations . . . The 1996 Act is . . .more specific legislation that must take precedence over the general antitrust laws.”).
During the Antitrust Division's antitrust case in the 1970's against the Bell system... some argued that the existence of FCC regulations displaced the antitrust laws and made them inapplicable. The courts emphatically rejected that challenge them [sic], and the antitrust savings clause in the bill today makes clear that that question cannot be reopened.  

The legislative history of the Telecom Act therefore effectively forecloses the interpretation of the Goldwasser court that the more specific regulations of the Telecom Act displace the traditional applicability of the antitrust laws.

Finally, in addition to affirmative congressional consideration of the continued applicability of the antitrust laws, the implication of the congressional repeal of Section 221(a) of the Communications Act also demonstrates congressional intent to prevent any interpretation of antitrust immunity.  

Section 221(a) had created an antitrust safe-haven for telecommunications mergers by rendering transactions deemed by the Commission to be in the public and consumers' interest immune from antitrust review. The Senate report analyzing the bill explains this conscious effort to eliminate any antitrust immunity, stating, "[t]he repeal would not affect the Commission's ability to conduct any review of a merger for Communications Act purposes... Rather, it would simply end the Commission's ability to confer antitrust immunity." Congress thus realized that any form of antitrust immunity would be counterproductive in achieving its goal of a competitive, deregulated telecommunications marketplace. This determination bolstered the overall congressional determination to preserve the authority of antitrust authorities to enforce the Act through the antitrust savings clause.

D. Goldwasser Ignored Legal Precedent

Extensive legal precedent shows that a regulatory scheme like the Communications Act does not confer immunity from antitrust liability upon those who fall under the regulatory scheme. In a private antitrust suit initiated by MCI Communications Corp. against AT&T, AT&T moved to dismiss the suit. MCI survived the motion to dismiss by demonstrating that "AT&T had unlawfully prevented interconnection for newly deregulated long distance providers with its then monopoly over the network for local telephone service that was necessary to complete both ends of any long distance call." The court in the Seventh Circuit, the same circuit of Goldwasser, stated, "the mere pervasiveness of a regulatory scheme does not immunize an industry from antitrust liability for conduct that is voluntarily initiated." The Seventh Circuit went even further by characterizing the local networks at issue in the case as "essential facilities" to impose antitrust liability for refusal to interconnect. The court defined an essential facility as "one that competitors must have, but are unable, for economic or technical reasons, to replicate. Therefore, unless access to the facility is mandated, competition of any kind cannot occur." The Seventh Circuit in Goldwasser thus ignored its own binding precedent in recently holding that Ameritech was entitled to regulatory immunity and rejecting AT&T's assertion of an antitrust immunity defense in MCI v. AT&T. Despite the fact that AT&T was then in control of the "local distribution facilities" and that AT&T was subject to FCC regulations regarding intercon-
connection requirements, the Goldwasser court created an antitrust immunity exception for ILECs that runs directly afoul of its own legal precedent.225

IV. THE DOMINOS OF GOLDWASSER—
CONGRESS MUST STEP INTO THE
GAME BEFORE COMPETITION LOSES

While the two separate statutory schemes—the Telecom Act and the antitrust laws—may employ different mechanisms to accomplish the same end of a competitive marketplace, the compatibility of these two schemes is explicitly recognized in the express and implied antitrust savings clauses of the Telecom Act, the legislative history of the Act and extensive legal and historical precedent. The Goldwasser court, however, based its holding on the incompatibility of the two sets of procedures. This holding is motivated by the fear that “the elaborate system of negotiated agreements and enforcement established by the Telecom Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action.”226

As a result, the Goldwasser court determined that the Telecom Act, as the more specific legislation, should control. At first blush, the Goldwasser decision may seem to give the Telecom Act more teeth. In actuality, such conferral of de facto antitrust immunity on the incumbent undercuts Congress’s intentions in enacting the market-opening provisions of the Act and threatens to sever the historic partnership between the Commission and the DOJ which guarantees the DOJ a role in reviewing the monopoly power of the RBOCs.227

This decision has broad, negative policy ramifications. The drafters of the Telecom Act constructed a careful balance to alleviate a traditional monopoly power. Goldwasser upsets this balance by eliminating the use of antitrust remedies to constrain behavior that may be related to the market-opening provisions of the Telecom Act but are so anticompetitive as to amount to a harm of the sort traditionally governed by antitrust. In doing so, Goldwasser only encourages the monopoly Bell companies to continue behaving as monopolists so as to be protected from the reach of the antitrust laws. Goldwasser disturbs almost 50 years of established antitrust jurisdiction and jurisprudence, leaving the existing telecommunications markets fraught with regulatory uncertainty.228

In order to achieve the Sherman Act’s and the Telecom Act’s goals of competitive marketplaces, the procedures set forth in the Telecom Act must be used in tandem with the remedies available under the antitrust laws. Because of the courts’ refusal to consider these principles together, Congress must clarify its intention that antitrust laws apply to those fact situations where the Bell company abuses its monopoly power to thwart competition. House Judiciary Committee Chairman Sensenbrenner explained the need for such a Goldwasser remedy:

At a minimum, we must reverse the Seventh Circuit’s recent decision in the Goldwasser case. That decision directly contradicts the clear congressional intent that the antitrust laws should continue in force in this industry. Goldwasser simply reads the antitrust savings clause out of the law, and it must be corrected . . . This sector of our economy achieved its current vibrancy because of the application of the antitrust laws. Only through the continued application of the antitrust expertise of this Committee will that free market vibrancy continue.229

Specifically, Congress must enact legislation to stop the domino train of Goldwasser in its tracks by defeating the Goldwasser court’s assumption of mutual exclusivity of the Telecom Act and the antitrust laws. During the 107th Congress, Congressman Chris Cannon, along with House Judiciary Committee Ranking Member John Conyers, introduced H.R. 1698, the “American Broadband

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225 MCI Communications Corp. v. AT&T, 708 F.2d at 1133-34.

226 Goldwasser II, 222 F.3d at 401.

227 Letter from F. James Sensenbrenner, Jr., House Judiciary Committee Chairman, to Dennis Hastert, Speaker of the U.S. House of Representatives 6 (May 1, 2001) [hereinafter Letter from Sensenbrenner] (on file with the author) (“Given the Justice Department’s unique expertise in competitive matters, Congress expressly provided within §271 that the Department would review RBOC compliance with the market-opening provisions of the Act and that the Federal Communications Commission would give the Department’s analysis substantial weight in making its decision with respect to an RBOC application to provide long distance service”); see also 47 U.S.C. §271(d)(2)(A).

228 See generally, Letter from Sensenbrenner, supra note 227, at 2-5 (discussing the historical precedent for antitrust oversight).

Competition Act of 2001” (Cannon-Conyers bill). This bill would resolve the regulatory confusion created by Goldwasser by ensuring “that the antitrust laws can be used against the Bell Companies if they fail to comply with the law... that competitors can interconnect with the Bell Company network, and [promote] the development of competitive local telecom markets.” Specifically, Title I of the bill would clarify that antitrust laws apply to violations of requirements imposed by the Telecom Act and not preempted by the Telecom Act. In addition, Title II of the bill would create mandatory alternative dispute resolution processes to resolve efficiently any disputes arising under local interconnection agreements. This bill would not drastically rewrite existing antitrust law or current telecommunications policy. Rather, the Cannon-Conyers bill would “simply sharpen the relation between antitrust law and Act, resulting in ‘preservation of competition in our industry’.”

Opponents of the Cannon-Conyers bill argue that it would “scrap years of antitrust jurisprudence” and “reverse Congress’s judgment five years ago to deregulate the telecommunications industry, promote competition and empower agencies, rather than antitrust courts.” They base their arguments on three general propositions.

First, they contend that the bill is unnecessary because the Seventh Circuit court in Goldwasser did not explicitly recognize any implied antitrust immunity for ILECs under the Telecom Act. They cite to the majority decision:

> Our principle holding is thus not that the Telecom Act confers implied immunity on behavior that would otherwise violate the antitrust law... It is that the Telecom Act imposes duties on the ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets.

In actuality, despite the majority’s recognition of the important role of the antitrust savings clause, the Goldwasser court also suggested that competitors may never assert antitrust suits against monopoly carriers who maintain control of their local networks in manners that stifle competition. Thus, competitive carriers are effectively denied the opportunity to pursue antitrust remedies when the incumbent monopoly carriers have failed to comply with the requirements of the Telecom Act because, under a Goldwasser analysis, “the Telecom Act is more specific legislation that must take precedence over the general antitrust laws.” Furthermore, specifying that “background antitrust laws can move to the fore” only after the Commission finds “that local markets have... become sufficiently competitive that the transitory regulatory regime can be dismantled,” the Goldwasser court erases any role for antitrust laws until markets have become sufficiently competitive and ignores the role that antitrust laws are supposed to play in helping to achieve competitive markets in the first place. The Cannon-Conyers proposal would stop the dominos of Goldwasser by clarifying that the antitrust laws are not preempted by requirements imposed by the Telecom Act, thereby preserving the availability of antitrust remedies.

Second, opponents argue that the Cannon-Conyers bill will only encourage a hodgepodge of litigation thereby actually harming competition. They believe that a Goldwasser remedy will only encourage competitive carriers to avoid agency action and instead take the antitrust route. The expediting mechanisms set forth in the Cannon-Conyers bill however, would help to minimize the number of potential lawsuits by making region-wide alternate dispute resolution

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231 Letter from John Windhausen, Jr., President, Association for Local Telecommunications Services, to House Judiciary Committee Chairman F. James Sensenbrenner, Jr. 1 (May 17, 2001) (on file with author).
232 H.R. 1698, supra note 231.
233 Id.
236 Goldwasser II, 222 F.3d at 401.
237 Id.
238 Id. at 401-02.
239 H.R. 1698, supra note 231.
240 See generally Barr statement, supra note 236.
241 Id.
processes available.\textsuperscript{242} The availability of alternative dispute resolution processes would therefore actually decrease the overall amount of lawsuits ultimately initiated by providing an alternate avenue for the enforcement of disputes arising under the interconnection agreement negotiation process.

Opponents of the legislation also argue that the Commission’s procedures enable quick resolution of such disputes and that allowing such an alternate path would result in delay and uncertainty.\textsuperscript{243} In actuality, “over the last few years, the FCC has promised consumers choice and competition in broadband services, but nothing that it did was enough for many DSL competitors to survive against dominant regional Bell telecommunications powerhouses.”\textsuperscript{244} The lack of FCC enforcement has therefore created a challenging telecommunications landscape for competitors hoping to break into the local exchange market. The Cannon-Conyers bill, however, would provide for stronger, quicker enforcement mechanisms through the institution of a time clock on the alternate dispute resolution process so as to prevent the RBOCs from litigating and appealing their competitors into extinction.\textsuperscript{245}

\begin{enumerate}
\item V. CONCLUSION

The competitive telecommunications industry is at a critical juncture. Hundreds of new start-up companies invested over $56 billion in deploying innovative technologies and have created almost 100,000 new jobs. The \textit{Goldwasser} decision, however, threatens to undermine these critical investments and to stem the tide of innovation and competition. Perhaps anticipating such a challenge, the drafters of the Telecom Act included a specific antitrust savings clause and a general savings clause preserving the applicability of all Federal law, both of which were crafted using standard savings clause statutory language. Then, to clarify Congress’ intent in including these two provisions and to eliminate any confusion as to the continued function of the antitrust laws, prominent House and Senate members and President Clinton issued explanatory statements describing the exact role that antitrust laws were to play in opening up the local market to competition. Finally, so as not to clip the role of the DOJ, Congress even repealed the ability of the Commission to immunize telecommunications mergers from antitrust scrutiny. Thus, while Supreme Court Justice Scalia characterized the Telecom Act as “a model of ambiguity or indeed of self-contradiction,” for the purposes of the determining the continued applicability of the antitrust laws, Congress drafted a model of clarity with its unambiguous assertion of the role of antitrust laws in the Telecom Act.\textsuperscript{246}

Despite such a clear Congressional mandate, the \textit{Goldwasser} court still effectively forecloses the availability of antitrust remedies. The Cannon-Conyers bill, or similar legislation based on that bill, is therefore needed to stop the dominoes of \textit{Goldwasser}. Congress recognized that the partnership of antitrust law and telecommunications regulation is crucial to the achievement of competition in the local marketplace. Without both of these tools at their disposal, both the regulators and those that they have been appointed to protect, the consumers, are at the mercy of the Bell monopolies. The domino train started by \textit{Goldwasser} threatens to topple the progress made thus far.\textsuperscript{247} Armed with the \textit{Goldwasser} decision, the RBOCs will not hesitate to aggressively protect their monopoly in the local network, destroying any progress already made and forever eliminating the hope of a competitive local exchange market. Only Congress can stop the toppling effect of

\begin{itemize}
\item 242 H.R. 1698, supra note 231.
\item 243 See generally Barr statement, supra note 236.
\item 244 BROADBANDINFO.COM, Bell DSL Rates Rise, Cable Likely to Benefit, at http://www/broadbandinfo.com/newsprint.asp?ContentID=2147432508 (last visited Nov. 15, 2001).
\item 245 H.R. 1698, supra note 231.
\item 246 AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 397 (1999).
\item 247 However, in a recent decision, Covad Communns. Co. v. BellSouth Corp., 2002 U.S. App. LEXIS 15486 (11th Cir. 2002), the U.S. 11th Circuit Court of Appeals distinguished \textit{Goldwasser} in part and rejected it in part, stating: \\
\hspace{1cm} ... we cannot agree with \textit{Goldwasser} to the extent that it is read to say that a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anti-competitive conduct that happens to be ‘intertwined’ with obligations established by the 1996 Act.
\item 248 At the same time, we agree with \textit{Goldwasser} that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations. Thus, a claim that a defendant failed to live up to its contractual obligations under an agreement made pursuant to the 1996 Act in and of itself will be insufficient to establish an antitrust violation. However, if a plaintiff also pleads facts that, if true, tend to show an anticompetitive purpose to create or maintain a monopoly, then that plaintiff has pleaded an antitrust violation.
\item 249 Id.
\end{itemize}
Goldwasser by reaffirming the intent and the language of the Telecom Act that the antitrust laws and telecommunications regulations and policies that complement each other must be used together. Through the passage of the Cannon-Conyers bill or other similarly crafted legislation, Congress can finish what it started back in 1890 with the passage of the Sherman Act by bringing irreversible competition to the monopoly-dominated local telecommunications market. If Congress fails to do so, then the game will soon be over and competition will come toppling down.